82-1158

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEWELL WEST a/k/a
JEWELL A. WEST,

Petitioner,

vs.

LEE ROY WEST,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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IN THE

SUPREME COURT OF THE UNITED STATES

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JEWELL WEST a/k/a
JEWELL A. WEST,

Petitioner,

vs.

LEE ROY WEST,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

QUESTION PRESENTED

Does a State's civil procedure violate the due process clause of the Fourteenth Amendment of the United States Constitution when said procedure allows service by publication notice to be effective and stand against an out of state Defendant notwithstanding that the Plaintiff learned of the actual whereabouts of Defendant prior to the taking of default judgment but proceeded thereunder without notice to said Defendant?

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DOES A STATE'S CIVIL PROCEDURE VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN SAID PROCEDURE ALLOWS SERVICE BY PUBLICATION NOTICE TO BE EFFECTIVE AND STAND AGAINST AN OUT OF STATE DEFENDANT NOTWITHSTANDING THAT THE PLAINTIFF LEARNED OF THE ACTUAL WHEREABOUTS OF DEFENDANT PRIOR TO THE TAKING OF DEFAULT JUDGMENT BUT PROCEEDED THEREUNDER WITHOUT NOTICE TO SAID DEFENDANT? 9
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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oklahoma, entered the 13th day of October, 1982.

OPINIONS BELOW

The Supreme Court of the State of Oklahoma assumed jurisdiction on April 28, 1980 upon petitioner filing an appeal and entered its opinion on the 13th day of October, 1982, denying said appeal.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma was pronounced as aforesaid on the 13th day of October, 1982, the jurisdiction of this Court is invoked under Title 28, §2101(c) of the United States Code.

Article 2, §7 of the Constitution of Oklahoma provides:

> "No person shall be deprived of life, liberty, or property, without due process of law."

Under Title 12, §952 of the Oklahoma Statutes, the following provision places the appellate jurisdiction of all judgments of District Courts of the State of Oklahoma with the Supreme Court of Oklahoma, to-wit:

> "(a) The Supreme Court may reverse, vacate or modify judgments of the District Court for errors appearing on the record, and in the reversal of such judgment may reverse, vacate or modify any intermediate order involving the merits of the action or any portion thereof."

Therefore, the judgment as issued on October 13, 1982, was a decision by the highest state tribunal having jurisdiction in such matters.

QUESTION PRESENTED

Does a State's civil procedure violate the due process clause of the Fourteenth Amendment of the United States Constitution when said procedure allows service by publication notice to be effective and stand against an out of state Defendant notwithstanding that the Plaintiff learned of the actual whereabouts of Defendant prior to the taking of default judgment but proceeded thereunder without notice to said Defendant?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved is the due process clause applicable to the States through the Fourteenth Amendment. See *Mullane vs. Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. The Fourteenth Amendment reads:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. Procedural History of the Case

Respondent filed a petition for divorce from petitioner in Osage County, State of Oklahoma, District Court on 16th of January, 1979. On that same date Respondent filed an affidavit to obtain service by publication.

Notice by publication was issued and published in the Pawhuska Journal-Capitol for three consecutive weeks and required an answer to be filed by March 2, 1979.

On March 7, 1979, a decree of divorce by default was entered in favor of respondent and against the petitioner. The District Court found the publication notice to have been proper.

On April 16, 1979, petitioner filed a motion to vacate the decree of divorce. The motion was amended on May 21, 1979. On July 31, 1979, after oral argument before the District Court, the matter was taken under advisement. Each party filed briefs and on April 2, 1980, the District Court denied and overruled petitioner's motion to vacate.

On April 28, 1980, a timely appeal was filed with the Supreme Court of the State of Oklahoma again raising the issue of lack of due process in the publication notice. On October 14, 1981, the appeal was assigned by the Supreme Court of the State of Oklahoma to the Temporary Court of Appeals.

On April 27, 1982, the Temporary Division No. 63 of the Court of Appeals, State of Oklahoma, affirmed the decision of the District Court. The Temporary Division No. 63 of the Court of Appeals held there was a distinction between cases where a respondent knew the petitioner's whereabouts

before he attempted service by publication, and where the plaintiff discovered defendant's whereabouts after filing. Only in the former instance, the Temporary Division No. 63 of the Court of Appeals held, could publication notice be said to be improper.

On May 4, 1982, petitioner filed a timely petition for rehearing, which was denied by Temporary Division No. 63 of the Court of Appeals on August 20, 1982, without comment.

On August 31, 1982, petitioner filed a timely petition for Certiorari with the Supreme Court of the State of Oklahoma, which was denied on October 13, 1982 without comment. This decision was then a final judgment of the State of Oklahoma's court of last resort. See Oklahoma Const., Art. 7, §1; 12 Okla. Stat. §952.

II. The Facts Material to the Questions Presented

During August, 1978, petitioner, JEWEL WEST removed herself from the home of the parties because of irreconcilable differences with the respondent, as to the circumstances surrounding which the petitioner has not been allowed to testify. The parties had been living as man and wife for nearly sixteen years and had one child, BOYD BARON WEST, who was thirteen and nearing fourteen years of age. On 6th of January, 1979, respondent filed a divorce petition which alleged:

> "4. That on or about the 18th day of August, 1978, the Defendant, without any notice to Plaintiff, abandoned the Plaintiff and removed herself from their home and that since that date to the present date, the Plaintiff has not seen the Defendant and has absolutely no knowledge as to her whereabouts other than the fact that at

one time he had information that she may have been in the State of California with no knowledge as to her address or present location . . ."

That same day an affidavit for the obtaining of service by publication was filed which alleged:

"Plaintiff and affiant herein further states that as set forth in said petition on file herein that the Defendant abandoned and removed herself from the residence of the parties on or about August 18, 1978, and that since that date the Plaintiff has had no knowledge as to her whereabouts although he had some information that she may have been at one time located in the State of California but that he had no specific address and no knowledge as to her whereabouts. Affiant further states that he made diligent inquiry with her friends and relatives and all sources available to determine her location or whereabouts but that said Defendant has purposely concealed her whereabouts from the Plaintiff since her departure in August, 1978, and that by reason thereof it is impossible to obtain service of summons upon said Defendant either within or without the State of Oklahoma and that the Plaintiff and affiant is entitled to obtain service of summons and notice upon her by publication as provided by law."

On January 26, 1979, one week after the respondent filed his petition and affidavit for notice by publication the petitioner wrote him a five page letter providing respondent with her address. That letter expresses petitioner's desire to work out a divorce settlement, requests that the respondent write her back at the address provided, states that when she comes back to town she would like to see her son, and states that petitioner felt it would be better if respondent went ahead and filed for divorce.

On February 5, 1979, petitioner sent the respondent another letter, this time by certified mail, stating that she had

talked to Bruce Gambill, an attorney in Pawhuska and that he had informed her that she should provide plaintiff with her mailing address so that she could receive the necessary papers. This letter ends with the petitioner requesting that respondent contact her in regard to this matter. According to petitioner's testimony she had not seen any notice in the Pawhuska paper but her mother had. Her mother did not know what kind of notice it was, only that both their names were mentioned. So petitioner had contacted Gambill who advised her to provide her present address to her husband so she could receive the necessary papers.

The answer date of March 2, 1979, was reached and the respondent had never responded to the letters of petitioner requesting more information on the divorce. In fact, the respondent had said nothing to the petitioner about a petition being filed for divorce and nothing about the fact that a default judgment would be taken against her on March 2, 1979. The respondent knew the address and location of the petitioner within one week after the filing of the petition, and yet made no attempt to reach her by mail or to inform her that a petition had been filed seeking a divorce from her. The divorce decree was entered on March 7, 1979, and by the provisions thereof the reason for the respondent's lack of communication with the petitioner becomes apparent.

As part of the findings of the Court in that decree it was stated:

> "The Court further finds that based upon the evidence given in open Court that Defendant herein did on or about the 18th day of August, 1978, remove herself from the home of the parties hereto without any advance notice to the Plaintiff or the minor child of the parties hereto and *that since said date the Plaintiff has not known her actual whereabouts* or location other than the fact that he was aware that she may have been in

> the State of California. The Court further finds based upon Plaintiff's Exhibit 1 as introduced in this Court that the said Defendant did on 5 February, 1979, write a letter to the Plaintiff advising Plaintiff that she was aware of the notice by publication which had been previously published in accordance with the provisions of law and that she had made contact with a law-firm in Pawhuska for the purpose of representing her and advising her but that said Defendant had made no appearance or filed any pleadings in this action nor had the Court been contacted by any attorneys representing said Defendant or had any pleadings been filed by any attorneys representing said Defendant and further based upon the statement of Plaintiff's counsel made in open Court that the counsel for Plaintiff had not been contacted by the Defendant or contacted by any attorney or any other person purporting to represent the said Defendant."
> [Emphasis added.]

An examination of this letter dated February 5, 1979, reflects that the above quoted portion of the decree of divorce is patently false. The letter states that the petitioner had contacted a lawfirm but no where states that an attorney had been retained to represent the Defendant's interest. Further the letter states in two places the mailing address of the petitioner. It is apparent from an examination of the letter and the above quoted portion of the decree of divorce that respondent carefully avoided stating whether or not he knew the present whereabouts, that is the whereabouts of the petitioner on March 7, 1979, because he did in fact know her whereabouts. Rather then explaining to the Court that he knew the petitioner to be still waiting for the copy of the "necessary papers" which she had requested him to send to her if he did file for divorce, instead respondent used the February 5, 1979, letter to induce the Court into entering a

decree by default. Respondent led the Court to believe that because petitioner had contacted a lawfirm that this meant she had retained counsel to represent her in the divorce and therefore she was aware of the divorce proceedings.

The decree provides that the respondent receive care, custody and control of the son of the parties, BOYD BARON WEST. The decree further provides that the property acquired by the parties be divided so that the respondent received all the marital estate, same being substantial, except those items of personal property which petitioner took with her and a bank account which was already in her name.

III. Federal Question of Due Process of Law Raised in All Courts Below

The question of the violation of petitioner's right to due process of law was raised at all stages of the Courts below, commencing with the District Court, as follows:

(1) By Motion to Vacate in the District Court of Osage County;
(2) By appeal to the Supreme Court of the State of Oklahoma;
(3) By Petition for Rehearing to the Temporary Division No. 63, Court of Appeals, State of Oklahoma;
(4) By Petition for Certiorari to the Supreme Court of the State of Oklahoma.

In each Court, the Constitutional question of due process was continuously urged and preserved.

ARGUMENT

DOES A STATE'S CIVIL PROCEDURE VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHEN SAID PROCEDURE ALLOWS SERVICE BY PUBLICATION NOTICE TO BE EFFECTIVE AND STAND AGAINST AN OUT OF STATE DEFENDANT NOTWITHSTANDING THAT THE PLAINTIFF LEARNED OF THE ACTUAL WHEREABOUTS OF DEFENDANT PRIOR TO THE TAKING OF DEFAULT JUDGMENT BUT PROCEEDED THEREUNDER WITHOUT NOTICE TO SAID DEFEENDANT?

From the facts hereinabove stated it is apparent that the method of notification employed by the respondent was not reasonably calculated to give petitioner knowledge at a meaningful time and in a meaningful manner of the attempted exercise of jurisdiction over her and allow her an opportunity to be heard. These minimum requirements for due process of the law as stated in the 14th Amendment of the United States Constitution, are discussed in the 1950 United States Supreme Court case of *Mullane vs. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Subsequently, this matter was also decided by the Oklahoma Supreme Court in the 1968 case of *Bomford vs. Socony Mobil Oil Co.*, 44 P.2d 713 (Okl. 1968). In that case at page 718 it was stated:

"The general rule that emerges from *Mullane* and

subsequent cases is simple: A state can not invest itself with, and exercise through its court, judicial jurisdiction over a person in a proceeding which may directly and adversely effect his legally protected interest, unless a method of notification is employed *which is reasonably calculated to give him knowledge at a meaningful time and in a meaningful manner* of the attempted exercise of jurisdiction and an opportunity to be heard." [Emphasis added]

At page 719 of that decision the Court stated:

"The Court is bound to take notice of the limits of its authority. It is its right and duty to make an examination into its jurisdiction, whether raised by pleadings or suggested by counsel or not, and to determine its power to entertain the cause. *If the Court finds that any stage of the proceeding that it is without jurisdiction, it is its duty to take proper notice of the defect* by staying the proceedings, dismissing the cause, or by other appropriate action.' [Emphasis added]

(Citing 21 C.J.S. Courts 175 §114.) Also at page 719 of Bomford, supra, the Court stated:

"Due process is violated by the mere act of exercising judicial power upon process not reasonably calculated to apprise the Defendant of the pendency of an action."

(Citing *Riverside & Dan River Cotton Mills vs. Menefee,* 237 U.S. 189, 35 S.Ct. 579, 59 L.Ed. 910 (1915). See also *Ross vs. Thompson,* 174 Okl. 183, 50 P.2d 385 (Okl. 1935); *Martin vs. Bastion,* 424 P.2d 1 (Okl. 1967); *Copas vs. Reents,* 365 P.2d 983 (Okl. 1961); and *Cravens vs. Corporation Commission,* 613 P.2d 442 (Okl. 1980).

As stated in *Mullane,* supra, at page 874:

"But when notice is a person's due, process which is a mere gesture is not due process. The means employed

> must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

At the hearing on petitioner's Motion to Vacate the decree in this case, the trial court stated, . . .

> "I have one problem Mr. Wilson which is of concern to me. Perhaps I am defining an issue which, in my humble way of thinking is paramount . . . we have here - and I don't believe I have heard any cases cited today yet which illuminate this, a publication notice which is in the file. Thereafter a publication notice is a letter giving the address. Do you see my problem gentlemen?"

The factual situation surrounding the *Bomford Case,* supra, involved a plaintiff not exercising due diligence in locating the address for the defendant prior to utilizing publication notice. In the petitioner's case the respondent not only knew the whereabouts of the petitioner, he intentionally misled the Court when on the date for the default judgment he failed to state that he was aware of the petitioner's whereabouts. See Antieau, 1 Modern Const. L. §7:10, p. 540; *Copas vs. Anglo-American Provision Co.,* 73 Mich. 541, 41 N.W. 690 (Mich. 1889), observing that most state appellate courts refuse to allow trial court's to exercise jurisdiction where it has been obtained by fraud of the plaintiff. If due process requires a plaintiff to make reasonable efforts to determine a defendant's whereabouts prior to taking a judgment by publication notice, certainly then a violation of the defendant's due process has occurred when the plaintiff actually knows the whereabouts of the defendant and yet obtains default judgment. As stated in *Mullane,* supra:

> "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself to appear or default, acquiese or contest." (70 S.Ct. at 657)

The Plaintiff had an affirmative duty to report to the Court once he was apprised of the petitioner's whereabouts. Especially when the petitioner had requested the divorce papers and had provided respondent her address, it would have been minimal effort to have mailed her a copy of his petition and notice of hearing. Instead the respondent continued to lead the Court into believing that those efforts which respondent had made prior to learning of petitioner's address on January 26, 1979, were in fact still non-productive. In a similar case, *Myers vs. Myers,* Okl. 240 P.2d 442 (Okl. 1952), the plaintiff was shown to have served the defendant by publication notice even though he had corresponded with her both before and after the default decree was entered and her exact street address was well known to him. In that case, the Court affirmed the trial Court's vacation of the decree once this fact was brought to the trial court's attention. In the case of *Johnson vs. Daniel,* 569 P.2d 981 (Okl. 1977), the Court stated,

> "Where names and addresses of adverse parties are known or are easily ascertainable, notice of pending proceedings by publication service alone, is not sufficient to satisfy the requirements of due process under Federal or Oklahoma Constitutions. All sources must be exhausted in a meaningful pursuit of information as to the defendant's whereabouts."

Also see Schroeder vs. New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed. 2d 255 (1962), *Citizens and Southern National Bank vs. Auer et al.,* 514 F.Supp. 631 (D.C. Tenn. 1977); *Robinson vs. Hanrahan,* 409 U.S. 38, 93 S.Ct. 30, 34 L.Ed2d 47 (1970).

Here, the respondent did not have to exhaust all sources but rather had information as to the petitioner's whereabouts readily available one week after the petition for divorce was

filed. However, when it comes to the default judgment, the respondent chose to act as if it had never obtained that information.

In the case of Rau vs. Cavenaugh, 500 F.Supp. 204 (D.C. S.Dak., 1980), where in foreclosure proceedings the plaintiff served the defendants' process by constructive notice published in the local paper, the Court held that since previous papers had been served the defendants by hand delivery and same worked no undue hardship on the plaintiffs, to ignore this effective means of notice was improper.

In the case of *McDonald vs. Mabee,* 243 U.S. 90, 61 L.Ed. 608, 37 S.Ct. 343 (1917), this Court, through Justice Holmes, once ruled that the best possible form of substituted service must be used, if personal service is not made within the jurisdiction. Justice Holmes stated: "To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done." The Court should be recalled to this standard.

Where an honest effort has not been made to obtain the information required for publication notice, the judgment rendered by the Court on the basis of such notice is void for lack of jurisdiction over the Defendant. See *Mullane vs. Central Hanover Bank & Trust Co.,* supra; *Faulkner vs. Kirkes,* 276 P.2d 264 (Okl. 1954); *Grover vs. Locke,* 279 P.2d 322 (Okl. 1955); *Locke vs. Baskett,* 311 P.2d 219 (Okl. 1957); 62 AmJur. 2d, Process, 904, §118. The same should be true both where the plaintiff fails in his due diligence prior to the affidavit for service by publication and after its filing but before default judgment is entered. In the *Faulkner Case,* supra, the plaintiff carefully avoided learning the defendant's address even though he knew a

banker who had that address. In *Ross vs. Thompson,* 174 Okl. 183, 50 P.2d 385 (Okl. 1935), the plaintiff by exercising "the slightest diligence" could have obtained the defendant's addresses from county records or the agency who rented the house involved in the lawsuit. Considering the above circumstances respondent cannot claim to have made an honest effort to notify the petitioner of the proceedings pending against her. The default judgment should therefore be vacated.

PRAYER

WHEREFORE, petitioner WEST respectfully requests that a writ of certiorari issue to the Supreme Court of the State of Oklahoma, and that the decision therein be reversed and remanded, so that the petitioner may be accorded her due process rights.

Respectfully submitted

/s/ Jack Duane Heskett

Jack Duane Heskett

/s/ Frederick Scott Esser

Frederick Scott Esser
(Co-Counsel)
502 Union Bank & Trust Bldg.
Bartlesville, Oklahoma 74003
(918) 336-1773

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on the 7th day of January, 1983, a true copy of the above and foregoing instrument was mailed to:

Robert W. Wilson
KANE, KANE, WILSON & MATTINGLY
Attorneys at Law
P. O. Box 1019
Pawhuska, Oklahoma 74056

with postage prepaid.

/s/ Rick Esser

IN THE

Supreme Court of the United States

October Term, 1982

No. _____

JEWEL WEST A/k/a
JEWELL A. WEST, Petitioner

vs.

LEE ROY WEST, Respondent

PETITION FOR A WRIT OF CERTIORARI
to
THE SUPREME COURT OF THE UNITED STATES

APPENDIX

I, the undersigned Deputy Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the attachments hereto are a complete roll of all orders, judgments and decisions in case No. 55,153, Temporary Court of Appeals Division No. 63, State of Oklahoma and Supreme Court of the State of Oklahoma, same being styled JEWEL WEST a/k/a JEWELL A. WEST, Appellant vs. LEE ROY WEST, Appellee, and that said documents attached, are, as noted thereon, true and correct copies of all such documents. Dated this 20th day of December, 1982.

ROSS N. LILLARD, JR.
Clerk of the Supreme Court
State of Oklahoma

BY: /s/ Carrie L. Sites
Deputy Clerk

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IN THE SUPREME COURT IN AND FOR THE STATE OF OKLAHOMA

No. 55153

JEWEL WEST a/k/a
JEWELL A. WEST, Appellant,

vs.

LEE ROY WEST, Appellee

PETITION IN ERROR

Comes now the Appellant, JEWEL WEST a/k/a JEWELL A. WEST, Defendant in the trial court case named hereinbelow, and asks this Court to find in error the ruling of the trial court in favor of the Appellee, LEE ROY WEST, Plaintiff in the trial court case named hereinbelow, in support of which Appellant alleges and states:

1. That the original trial court was the District Court of Osage County, Pawhuska, Oklahoma;
2. That in that court this matter was styled LEE ROY WEST, Plaintiff versus JEWEL WEST a/k/a JEWELL A. WEST, Defendant, and given the case number JFD-79-17;
3. That the case arose upon Plaintiff's (Appellee) filing of a petition asking the Court to grant a divorce from Defendant (Appellant) on January 16, 1979; that on January 19, 1979, Plaintiff (Appellee) filed an affidavit asking that the Defendant (Appellant) be served by

publication; that on January 27, 1979, Plaintiff (Appellee) received a letter from Defendant (Appellant) stating her address; that Defendant (Appellant) attempted again to contact Plaintiff (Appellee) by certified mail on February 2, 1979, but that in spite of knowledge of Defendant's (Appellant) address Plaintiff (Appellee) had already begun notice by publication; that on February 9, 1979, Defendant (Appellant) contacted Plaintiff (Appellee) by telephone and was told that he had filed for divorce, that it would take a long time and that she would be hearing from him; that on March 7, 1979, in spite of the fact that Plaintiff (Appellee) knew where Defendant (Appellant) could be contacted and knowing she had never seen a copy of the pleading though she was led to believe she would see same, a decree of divorce was taken; that the decree as ordered gave custody of the child of the parties to the Plaintiff (Appellee) without visitation rights by the mother Defendant (Appellant) and gave all furniture, fixtures, real property, livestock, vehicles and bank accounts to Plaintiff (Appellee) leaving Defendant (Appellant) only those items of personal property in her possession.

4. That on April 16, 1979, a Motion to Vacate Judgment of Decree of Divorce was filed in behalf of Appellant; on May 21, 1979, Appellant filed an Amended Motion to Vacate along with a Brief in Support; on December 3, 1979, Appellant filed a Motion for Default for Failure of the Plaintiff to File Brief; on December 12, 1979, Appellee filed a Brief; on January 25, 1980, Appellant filed a Response Brief; that on the 2nd day of April, 1980, the Honorable Mermon H. Potter, Associate District Judge, Osage County, Oklahoma, made a Findings of

Fact and conclusions of law allowing the decree to stand as ordered, which decision Appellant now requests be reversed.

5. That, as Appellant will more fully explain in her brief to be filed herein, the Appellee could not avail himself of notice by publication when he knew the address where the Appellant could be served by certified mail; further that knowing Appellant's address, Appellee should have attempted service by certified mail prior to publication; that instead Appellee lulled the Appellant into complacency until the required answer date had passed and Appellant was in default in order to obtain a divorce decree which was lopsided in Appellee's favor; that the original findings of fact and conclusions of law in the decree of divorce were not sufficient under the standards enunciated in District Court Rule No. 16 requiring a recitation that primary and secondary sources of locating a Defendant must be stated to have been used prior to allowing a publication notice default to stand; that Appellee did not comply with the requirements of 12 O.S., §§170.6, 170.7, 173, 174 and the edicts of the cases of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, *Bomford v. Socony Mobile Oil Co.* 440 P.2d 713, *Copas v. Reents*, 365 P.2d 983, among others requiring due diligence in notifying a Defendant of an action pending prior to utilizing notice by publication; that under the constitutions of both the United States of America and the State of Oklahoma, Appellant has been denied procedural due process of the law.

6. That Appellant seeks the original divorce decree reversed, remanded and instructions to be given the trial court that

both sides be allowed to present their evidence; further that as required by 12 O.S. § § 1275 and 1278 a division of the property be had in a "just and reasonable manner"; that as required under 12 O.S., § 1275, custody of the minor child of the parties be made in a "proper manner"; finally that the Appellant be allowed to file an Answer and Cross-Petition in the case allowing her to be on equal footing with the Appellee.

7. That counsel for Appellee, LEE ROY WEST, is Mr. W. ROBERT WILSON, KANE, KANE, WILSON & MATTINGLY, whose mailing address is P. O. Box 1019, Pawhuska, Oklahoma 74056 and whose telephone number is (918) 287-3143.

Attorneys for Appellant
HESKETT, HESKETT, DANIEL & ESSER

BY: _____

Rick Esser
337 Price Tower
Bartlesville, Oklahoma 74003
(918) 336-1773

CERTIFICATE OF FILING WITH TRIAL COURT AND OF MAILING

I, the undersigned, do hereby certify that a copy of the

petition in error was filed in the trial court and a copy mailed to counsel of record:

W. Robert Wilson
KANE, KANE, WILSON & MATTINGLY
Attorneys at Law
P. O. Box 1019
Pawhuska, Oklahoma 74056

with postage prepaid.

_____

Rick Esser

IN THE DISTRICT COURT OF OSAGE COUNTY, OKLAHOMA

Lee Roy West,	)	
Plaintiff,	)	
vs.	)	No. JFD-79-17
Jewel West, a/k/a Jewell A. West,	)	
Defendant.	)	

DECREE OF DIVORCE

Now on this 7th day of March, 1979, the above entitled matter comes on for hearing pursuant to regular assignment, the plaintiff appearing in court in person and by and through his attorneys of record, Kane, Kane, Wilson & Mattingly by W. Robert Wilson, and the defendant having been called three times in open court appears not.

Plaintiff then announced ready and this matter proceeded to trial.

Thereupon, the court duly examined all files and records on file herein and after hearing the evidence of the plaintiff given in open court and the statement of counsel, makes the following findings, to-wit:

The court finds that the plaintiff was at the time of the filing of his petition herein and had been for a period of time exceeding one year a good faith resident of Osage County, Oklahoma, and that this court has full jurisdiction over this matter and the parties hereto.

The court finds that the defendant herein was duly served with summons and notice of this suit by publication in the manner and form prescribed by law and in connection therewith, the court having examined the verified Affidavit

To Obtain Service By Publication by the plaintiff as filed in this case on January 16, 1979, and hearing the evidence given in open court finds that pursuant to said affidavit, notice by publication of this suit was given to the defendant and after having duly examined said notice by publication and the proof of publication as filed herein and having conducted fully a judicial inquiry into the sufficiency of the said plaintiff's search to determine the whereabouts of the said defendant who was served herein by publication, the court, based upon its judicial inquiry and based upon the matters set forth in the verified Affidavit and the testimony given in open court by said plaintiff finds that the plaintiff had exercised due diligence and conducted a meaningful search of all reasonably available sources at hand to locate said defendant so that she could be served personally but that he was unable to locate her or determine her whereabouts at the time the Affidavit was filed and the notice published as required by law, by reason of which he was unable to obtain personal service of summons upon her and the court after such judicial inquiry approves the publication service as given herein as meeting both statutory requirements and the minimum standards of state and federal due process of law.

The court further finds that based upon the evidence given in open court that the defendant herein did on or about the 18th day of August, 1978, remove herself from the home of the parties hereto without any advance notice to the plaintiff or the minor child of the parties hereto and that since said date the plaintiff has not known her actual whereabouts or location other than the fact that he was aware that she may have been in the State of California. The court further finds based upon plaintiff's Exhibit 1 as introduced in this court that the said defendant did on February 5, 1979, write a letter to the plaintiff advising the plaintiff that she was aware

of the notice by publication which had been previously published in accordance with the provisions of law and that she had made contact with a law firm in Pawhuska for the purpose of representing her and advising her but that said defendant had made no appearance or filed any pleadings in this action nor had the court been contacted by any attorneys representing said defendant or had any pleading been filed by any attorneys representing said defendant and further, based upon the statement of plaintiff's counsel made in open court that the counsel for plaintiff had not been contacted by the defendant or contacted by any attorney or any other person purporting to represent the said defendant.

The court further finds that the parties hereto were married on September 28, 1962 in Bartlesville, Washington County, Oklahoma, and that of said marriage, one child has been born, namely, Boyd Baron West, he having been born on September 9, 1964.

The court finds that based upon the evidence introduced in open court that by reason of the acts of said defendant that she has created a state of incompatibility and has grossly neglected her duties towards said marriage and that she has abandoned said plaintiff and the minor child of said parties for a period of time in excess of six months and by reason thereof a state of complete and irreconcilable incompatibility has arisen between the parties which has completely destroyed the legitimate aims of said marriage and that the plaintiff is entitled to a decree of divorce of and from the defendant.

The court further finds that the plaintiff is a fit and proper person to have the care, custody and control of the minor child of the parties hereto, to-wit: Boyd Baron West, and that the permanent care, custody and control of said child is vested in the plaintiff and that if the defendant has any desire

to have visitation rights with said child, that said defendant shall make application with this court and the court shall at that time take under consideration visitation rights by said defendant with the minor child of the parties hereto.

The court further finds that during the course of said marriage the parties have accumulated certain property and the court finds that as to said property the same should be set aside to the parties and disposed of as follows:

a. The defendant should be awarded all of her personal clothing and personal effects and in this connection, the court finds based upon the evidence that at the time the said defendant abandoned said plaintiff she took with her the majority of all of her personal clothing and effects but that if any of said personal clothing and personal effects still remain in the residential home of the parties which is now occupied by plaintiff, that said personal clothing and personal effects are awarded to said defendant.

b. That the plaintiff is awarded all furniture, fixtures, appliances and other personal property located within the residential home of the parties hereto and further is awarded the residential home of the parties which is located upon real estate hereinafter distributed by this court.

c. The court further finds that the plaintiff is the owner of certain livestock and that all livestock is awarded to him subject to all indebtedness thereon which he shall pay.

d. The court further finds that the plaintiff is in the possession of a pickup truck and automobile and that both of said vehicles are awarded to the plaintiff subject to any indebtedness which might be due and owing thereon.

e. The court further finds that the plaintiff is awarded all other personal property of every kind and character now in

the possession of the plaintiff or located on or used in connection with the lands or ranch operations of the plaintiff.

f. Plaintiff is awarded all of his personal clothing and personal effects as well as title to any and all bank accounts and money on deposit therein.

The court further finds that with regard to property accumulated by said parties that on July 1, 1967, a general warranty deed was executed whereby title to certain property as hereinafter described was vested in Ed E. West, father, Lee Roy West, son, and Jewel West, wife of Lee Roy West, title to said property being vested in all of them as joint tenants with the right of survivorship. In connection with this, the court finds upon the evidence introduced in open court, that said property was purchased by the plaintiff and by his father, Ed E. West, and that said parties paid the purchase money thereof and that the defendant contributed no purchase money to the acquisition of said property or to the purchase price as paid by said parties and that said property has been treated and considered by said parties as belonging to the plaintiff, Lee Roy west, and to his father, Ed E. West. The court finds that any interest which the defendant may have in and to said property either present or remainder interest, is hereby vested in the plaintiff, Lee Roy west and that said defendant shall within ten days of the date of this decree execute a quit claim deed conveying all of her interest in and to said property to the plaintiff and in the event she fails or refuses to execute and deliver said deed that this decree shall serve as a conveyance from the defendant to the plaintiff of all of said defendant's interest in and to said property as hereinafter described whether the same be a present and vested interest or a remainder interest.

The court further finds that there is on deposit with Sooner Federal Savings & Loan Association of Tulsa, Oklahoma, a Savings Certificate No. SC8700104-1 in the principal amount of $20,000.00, said savings certificate standing in the name of Lee R. West and/or Jewell A. West as co-trustees with the right of survivorship for Boyd B. West. In this connection the court finds that said savings certificate and all funds on deposit therein was created by the parties to this action for the benefit of their minor son, Boyd B. West, and that said savings certificate should be vested solely in the name of the plaintiff, Lee R. West, as trustee for Boyd B. West, minor child of the parties, and that the defendant shall have no further rights whatsoever in or to said certificate. In this connection the court finds that a copy of this order shall be delivered to Sooner Federal Savings & Loan Association of Tulsa, Oklahoma and upon receipt thereof they shall make the proper changes in said certificate showing that the same stands vested solely in the name of the plaintiff, Lee R. West as sole trustee for the use and benefit of Boyd B. West and that the defendant has no further rights or claims whatsoever in or to said certificate.

The court further finds that during the course of said marriage and in particular within the last four years thereof the plaintiff has given to the defendant the sum of $3,070.00 which based upon the evidence given in open court has been placed in a savings account in the name of the defendant alone and the court finds that said funds or such funds as may be left are hereby set apart and awarded to the defendant as her sole and separate property.

The court further finds that the defendant is denied any alimony.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED by this court that the plaintiff be and he

hereby is granted a decree of divorce of and from the defendant on the grounds of incompatibility and based upon the facts heretofore set forth by this court in its findings, provided, however, that this portion of the decree shall not become final until the expiration of six months from the date hereof during which time the parties hereto shall be and they are hereby prohibited and enjoined from marrying any other person.

IT IS FURTHER ORDERED that the sole care, custody and control of the minor child of the parties hereto, to-wit: Boyd Baron West, be and he hereby is placed with the plaintiff and that if the defendant desires any rights of visitation with said minor child, that she shall make application to this court and upon proper application being made the court shall give consideration granting to said defendant rights of visitation as the court may deem proper.

IT IS FURTHER ORDERED that of the properties accumulated by the parties during said marriage that the same shall be disposed of and awarded to the parties in the following manner, to-wit:

Defendant shall be awarded the following:

a. All of her personal clothing and personal effects.

b. All funds in her possession or deposited in bank accounts to her name alone which are either now in her possession or under her control.

Plaintiff shall be awarded the following:

a. All of his personal clothing and personal effects and all household furniture, appliances and fixtures and all other personal property now located in the residential home of the parties.

b. The pickup truck, automobile and all other items of personal property including all farming and ranching

equipment and all other items of personalty located on or used in connection with the farming and ranching operations of said plaintiff and located on lands belonging to said plaintiff or under his control.

c. All livestock subject to any and all indebtedness thereon.

d. Plaintiff is awarded full title to all interest of the defendant whether vested or remainder interest in and to the following described real estate, to-wit:

SW/4 NW/4 and W/2 SW/4 of Section 32; Lot 4 and S/2 SE/4 SW/4 and SE/4 and E/2 W/2 E/2 SE/4 NE/4 and E/2 E/2 SE/4 NE/4 and NW/4 NW/4 NE/4 SE/4 NE/4 and SE/4 NE/4 NE/4 and S/2 NE/4 NE/4 NE/4 and S/2 S/2 S/2 SW/4 NE/4 and NE diagonal 1/2 of SW/4 NW/4 NE/4 SE/4 NE/4 of Section 31, all in Township 24 North, Range 11 East, Osage County, Oklahoma, together with all improvements located thereon and less and except all oil, coal, gas and other minerals lying in and under said lands which are reserved to and owned by the Osage Tribe of Indians.

IT IS FURTHER ORDERED that the defendant shall within a period of ten days from the date of this decree, execute and deliver to the plaintiff a quit claim deed conveying all of her interest in and to the above described real estate together with improvements located thereon and in the event of her failure to execute and deliver such deed, then this decree shall serve as a conveyance of all of the defendant's interest, whether present, vested or remainder interest in and to the above described real estate from the said defendant to the plaintiff.

IT IS FURTHER ordered that title to Savings Certificate No. SC8700104-1 and all funds on deposit thereunder with Sooner Federal Savings and Loan Association of Tulsa, Oklahoma, shall be and the same hereby is vested solely in the plaintiff, Lee R. West, as sole trustee for the use and benefit of the minor child of the parties, Boyd B. West, and that upon delivery of a copy of this decree to the said Sooner Federal Savings and Loan Association of Tulsa, Oklahoma, that they shall make all appropriate changes to show said ownership as being vested solely in the plaintiff as above set forth.

IT IS FURTHER ORDERED that the findings of this court as heretofore set forth are all incorporated into and made a part of the orders of this court the same as if set forth again herein in full.

/s/ Mermon H. Potter

MERMON H. POTTER
Associate District Judge

IN THE DISTRICT COURT OF OSAGE COUNTY, OKLAHOMA

LEE ROY WEST,	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	Case JFD-79-17
JEWEL WEST, a/k/a	)	
JEWELL A. WEST,	)	
Defendant,	)	

FINDINGS OF FACT AND CONCUSIONS OF LAW

1. The Court finds as a finding of fact that the cause comes on now before this Court on defendant's herein Motion to Vacate Decree of Divorce entered on March 7, 1979.

2. The Court further finds as a further finding of fact that evidence on the cause was heard before the Court by evidence adduced and supporting briefs filed herein.

3. The Court further finds as a finding of fact that the allegation of facts as alleged by plaintiff are apparently undisputed, as follows:

A. On or about August 18, 1979 defendant abandons plaintiff and minor child of the parties.

B. Plaintiff by and through counsel files petition for divorce against defendant on January 19, 1979.

C. Plaintiff in January 19, 1979, files an affidavit for publication alleging whereabouts of defendant is unknown in that plaintiff has no specific knowledge of an address of the defendant.

D. January 19, 26 and that of February 2, 1979, Notice by Publication properly published.

E. February 5, 1979, defendant in a correspondent with the plaintiff states that she has knowledge of the pending divorce litigation and further has contacted a local (Pawhuska) law firm and said firm has advised her of her legal rights. The letter of February 5, 1979, further states addresses where defendant receives her mail.

F. March 2, 1979, Notice by Publication Answer Date.

G. March 7, 1979, Decree of Divorce Granted by the District Court of Osage County, Oklahoma. No appearance or pleadings filed in behalf of defendant.

H. No contact with Court or Counsel for a period of thirty days since the heretofore mentioned letter of February 5, 1979.

I. Defendant by and through counsel file a Motion to Vacate on April 16, 1979.

4. The Court further finds as a finding of fact that after a careful examination of the facts and issues of law, the determinating issue is whether or not Title 12, O.S. 176 has been properly complied with, that is to say; . . . . . did defendant . . . . . "make it appear to the satisfaction of the Court, by affadavit, or other evidence that during the pending action he had no actual knowledge thereof in time to appear in Court and make his defense", . . .

5. The Court further finds as a finding of fact and conclusion that Section 176 of 12, Oklahoma Statutes, 1979 must be liberally construed. Warren Johnson vs. L.D. McDaniel, d/b/a Aetna Oil Co., 569 P.2d 977 (1977).

6. The Court further finds as a finding of fact and conclusion of law that defendant in her correspondence of February 5, 1979, alludes to in paragraph No. 2 that . . . "I

was also advised that if *the terms of the proceedings are not fair to me and meet with my approval that my lawyer will be prepared to file a countersuit insuring me of a fair settlement.* emphasis added. Indicating that defendant not only has actual knowledge of the proceedings but would indeed complain by and through a countersuit, here in all probability a Motion to Vacate, as a lapse of 71 (seventy-one) till a pleading in the form of Motion to Vacate was filed, if indeed the defendant was not satisfied with the "proceedings".

7. The Court further finds that a period of 45 (forty-five) days lapsed since the entry of the Decree of Divorce before defendant filed a pleading in the form of a Motion to Vacate.

8. The Court further finds as a finding of fact that Defendant's letter of February 5, 1979, was illustratus to the Court of the fact that defendant did possess full knowledge of the divorce proceedings at least (30) thirty days prior to entry of the Decree of Divorce, yet filed no appearance or pleading until 45 (forty-five) days after the Decree of Divorce was entered.

CONCLUSION

"..... the particular probative facts showing due diligence must be presented to the Court before judgment is rendered. These facts need not be set forth in the affidavit or in a verified pleading, but they must be adduced by proof presented at a hearing to be conducted before entry of judgment. The trial judge shall not approve publication process effected in any case unless he is satisfied from the evidence presented that plaintiff has met the requisite standard of due diligence." Bomford vs. Socony Mobil Oil

Co., Okl. 440 P.2d, 713, 720 (1968)... and whether or not the applicant (*to open default judgment/Motion to Vacate*) has satisfactorily made it appear to the Court, by affidavits and or other evidence, that during the pendency of the action, the applicant had not actual notice thereof in time to appear in Court and present his defense. Gann vs. Gann 459 P.2d 605, 606, (1969). Trial Court emphasis.

Thus premised upon the foregoing findings of fact and conclusions of law, the Court concludes that plaintiff herein has met and complied with the dictates of 12 O.S. 170.6 and that of the requisite standard of due diligence as evidence by Affidavit for Publication, Notice by Publication, Proof of Publication, transcribed proceedings of March 7, 1979, all exhibits admitted, and finding of the Trial Court thereafter entered on March 7, 1979, in Case No. JFD-79-17, West vs. West.

The Court further concludes that the defendant herein has failed to overcome the burden of showing she had no actual knowledge of the proceedings in time to defend the same.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that defendants' Motion to Vacate is respectfully overruled.

BE IT SO ORDERED.

ASSOCIATE DISTRICT JUDGE

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

IN RE: Assignment of Judges and Appointment of Lawyers to a Temporary Division of the Court of Appeals Convened by Order of the Supreme Court and Assignment of Cases to that Division.

ORDER

Pursuant to Art. VII, § 1, Okla. Const. and 20 O.S. 1981, § 30.14 the following named judges and lawyers are hereby assigned and/or appointed to Temporary Division No. 63, of the Court of Appeals, State of Oklahoma:

Bill Settle, P. O. Box 1368, Muskogee, OK 74401
R. Forney Sandlin, P. O. Box 1934, Muskogee, OK 74401
Andrew Wilcoxen, P. O. Box 357,Muskogee, OK 74401
The following cases are assigned to the division:
Case No. 55,032
& Style Taylor v. Rust

Case No. 55,039
& Style Chemco Products, Inc. v. Moley Produce Co., Inc.

Case No. 55,153
& Style West v. Jewell a/k/a West

It is ordered that the Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court, published in Title 12, Oklahoma Statutes, Chapter 15, Appendix 3, as amended by Supreme Court Orders dated

September 3, 1976 and June 22, 1979, are to be followed until further order of this Court.

It is further ordered that until the Court of Appeals has made final disposition of any assigned case, any and all Motions, Petitions for Rehearing, etc., must be filed with the Clerk of the Court of Appeals, Room 104, State Capitol Building, Oklahoma City, Oklahoma, 73105.

DONE BY ORDER OF THE SUPREME COURT this 13th day of October, 1981.

_____

CHIEF JUSTICE

TEMPORARY DIVISION NO. 63, OF THE COURT OF APPEALS, STATE OF OKLAHOMA.

LEE ROY WEST,	)	
	)	
Appellee,	)	
	)	
vs.	)	No. 55153
	)	
JEWEL WEST, a/k/a JEWELL A. WEST,	)	
	)	
	)	
Appellant.	)	

APPEAL FROM THE DISTRICT COURT OF OSAGE COUNTY; MERMAN H. POTTER, JUDGE.

Action by Jewel West a/k/a Jewell A. West against Lee Roy West to vacate judgment of Decree of Divorce obtained by publication. The trial court denied the motion to vacate and the defendant-appellant appeals. Affirmed.

Kane, Kane, Wilson & Mattingly, by W. Robert Wilson, Pawhuska, Oklahoma, for Appellee.

Heskett, Heskett, Daniel & Esser, by Rick Esser, Pawhuska, Oklahoma, for appellant.

SETTLE, BILL J. The facts of this matter are not in dispute. The appellant on or about the 18th day of August, 1978, left the home of the parties where they had resided as husband and wife. The parties were married on September 28, 1962 and had one son who, at the time of the hearing of this matter, was fifteen (15) years of age. During the period

of time from August 18, 1978 up to and including January 16, 1979, the appellee did not know the whereabouts of the appellant. During that period of time the son did receive a post card from the appellant postmarked from the State of California. The appellee contacted a cousin in the State of California sometime during the month of either November or December, 1978 and learned that his wife, the appellant, had been to the home of the cousin but that the cousin did not know where she, the appellant, was at the time the appellee made inquiry. The appellee filed a petition for divorce from the appellant on January 16, 1979. Plaintiff further filed an affidavit to obtain service by publication on January 16, 1979, stating among other things, "the defendant abandoned and removed herself from the residence of the parties on or about August 18, 1978, and that since that date the plaintiff has had no knowledge as to her whereabouts although he had some information that she may have at one time been located in the State of California but that he had no specific address and no knowledge as to her whereabouts. Affiant further states that he has made diligent inquiry with her friends and relatives and all sources available to determine her location or whereabouts but that the said defendant has purposely concealed her whereabouts from the plaintiff since her departure in August of 1978. . ." The record further reflects that during the period from August 1978 to January 16, 1979, the appellee had conversations with the parents of the appellant trying to learn her whereabouts but was unsuccessful. The record reflects the first notice by publication was made on the 19th day of January, 1979, with the last notice having run on the 2nd day of February, 1979. There was a notice also on the 26th day of January, 1979. There is no contention the publication notice is improper except that the appellant did not have actual notice.

The record further reflects the appellant wrote the appellee by letter dated January 26, 1979. The appellee testified the letter was received on January 27, 1979. The letter discusses the reasons the appellant left home, discusses divorce and arrives at the conclusion the appellee should file for divorce. The appellant enclosed in the said letter an address where she could receive return mail. She stated in said letter if it was mailed to said address she would get it some time; that they see these people now and then to pick up the mail but have not told them where they were staying because they did not want the people to become involved. The record reflects a second letter mailed by the appellant dated February 5, 1979 and received by the appellee. The letter starts out as follows, "Lee, In regard to the notice in the newspaper that you have filed for divorce — I want you to know that I have contacted a law firm in Pawhuska and they advised me of my legal rights. They told me I should give you my mailing address so that I can receive the necessary papers." The appellant then give the same address as previously given in the letter dated January 26, 1979. The appellant went on to state in the letter that she was advised if the terms of the proceedings were not fair to her and meet her approval that her lawyer will prepare a counter suit insuring her of a fair settlement. She further went on to state she was expecting to hear from the appellee concerning this matter.

The appellee did not respond to the letters of the appellant and appeared before the Honorable Mermon H. Potter on the 7th day of March, 1979. The court took testimony and the appellee testified the appellant left on August 18, 1978 and he did not hear from her or know of her whereabouts until he received a letter on January 27, 1979. The appellee testified he received another letter dated February 5, 1979.

Appellee testified he had no knowledge of the whereabouts of the appellant at the time he signed the affidavit for notice by publication dated January 19, 1979. Following testimony concerning the property acquired by the parties and testimony regarding the child, the court approved the notice by publication, granted the divorce and awarded certain of the property to the appellee and certain of the property to the appellant. Custody of the minor son was placed with the appellee. The decree of divorce was filed March 7, 1979.

The appellant made her initial appearance in this matter on April 16, 1979 by filing a Motion to Vacate the Judgment of Decree of Divorce alleging she had no actual knowledge or notice of the pendency of the divorce action until March 27, 1979 as she had been absent from the state since August of 1978. An Answer and Cross-Petition was also filed the same date. The appellant filed an Amended Motion to Vacate Judgement of Decree of Divorce on May 21, 1979 additionally alleging that she had been informed by her mother that some kind of notice was in the newspaper and upon learning of the same consulted a Pawhuska attorney, Bruce Gambill, who advised her the appellee was required to give notice by mailing and that the appellant thereafter wrote the plaintiff sending him her address. The appellant further alleged her failure to defend was without fault or latches on her part.

A hearing was held in this matter before the Honorable Mermon H. Potter on July 7, 1979. After a hearing the Court allowed each side to submit briefs. This was done although several months passed before the briefs were filed. Thereafter the court issued findings of fact and conclusions of law. The Court found the appellant had actual notice of the proceedings pursuant to Title 12, O.S.A. 176 and overruled the Motion to Vacate.

The dispositive issue herein centers around the issue of whether or not the appellant had actual notice of the proceedings in time to appear in court and make her defense. The above quoted statute governs proceedings to opening a judgment after default on service by publication. The statute in part states "Before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit or other evidence, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense. . ." The appellant did not, as required by the statute, make it appear to the satisfaction of the court that she had no actual notice of the proceedings in time to appear in court and present her defense. The facts of this matter as affirmatively shown in the letter of February 5, 1979, produced as plaintiff's exhibit No. 1 at the hearing on July 7, 1979, specifically recites the appellant has notice of the publication in the newspaper that the appellee had filed for divorce.

The leading Oklahoma case on service by publication is *Bomford v. Socony Mobile Oil Co.*, 440 P2d 713. This case sets forth the rule that a court cannot obtain jurisdiction over a party unless a method of notification is employed which is reasonably calculated to give him knowledge at a meaningful time and in a meaningful manner of the attempted exercise of jurisdiction and an opportunity to be heard. The method of notice by publication in the West case was proper in all respects and so held by the trial court. Since the intent or purpose is to give the party being sued knowledge or notice in time to respond to said suit, said purpose was achieved in this case as the appellant in her letter dated February 5, 1979 to

the appellee acknowledged the fact that the newspaper carried a notice that he had filed against her for divorce, she even contacted legal counsel to ascertain her rights of the matter. Therefore the prerequisites of *Bomford v. Socony Mobile Oil Co.*, supra, were met. Although the appellant states in her Motion to Vacate the Judgment of Decree of Divorce she did not have actual notice of the divorce action until March 27, 1979, her letter of February 5, 1979 states otherwise. The appellant therefore failed to sustain the burden of proof on the issue of actual notice and therefore the default judgment rendered against her in the divorce should not be reopened so that the appellant might be let in to defend. *Gann v. Gann,* 459 P2d 605.

The appellant cites several cases to support the contention that the appellee knew her whereabouts and should therefore have obtained personal service upon the appellant. However, all of these cases refer to instances where the whereabouts of the opposing party were known prior to the filing of the petition or instigation of the proceedings. In this case, the whereabouts of the appellant were not known to the appellee until after the notice by publication had run a second time and it was further found by the court that the appellee did not know the whereabouts of the appellant at the time the affidavit for notice by publication was filed. The cases are theefore distinguishable from the facts in this case.

It has long been the law in the State of Oklahoma that where a person has actual knowledge of facts sufficient to put a prudent man on inquiry, he has "notice" of everything which such inquiry would disclose. The appellant knew the appellee had filed for divorce at least by the 5th of February, 1979. She even contacted an attorney to determine her rights in the matter. Simple inquiry or investigation would have disclosed that the appellee was asking for all real and

personal property acquired during the marriage; that he was asking for custody of the minor child and that she had until the 2nd day of March, 1979 to make an appearance in said case. Thus, the appellant knew the divorce had been filed and was pending at least twenty six days before the answer date and thus had actual notice of facts which if investigated allowed her to enter the case and defend. *Detrick, et al. v. Kitchens,* 86 P2d 998; *Hildebrand v. Harrison,* 361 P2d 498; *Leche v. Ponca City Production Credit Assoc.,* 478 P2d 347 and *Palmer v. Crews Lumber Co.,* 510 P2d 269.

The judgment is affirmed.

Wilcoxen, Andrew, P.J. and Sandlin, R. Forney, J., concur.

TEMPORARY DIVISION NO. 63, OF THE
COURT OF APPEALS,
STATE OF OKLAHOMA.

LEE ROY WEST,	)	
	)	
Appellee,	)	
	)	
vs.	)	No. 55153
	)	
JEWEL WEST, a/k/a JEWELL A. WEST,	)	
	)	
	)	
Appellant.	)	

ORDER

The application of the Appellant for re-hearing and motion for oral argument having been considered by this Court is hereby denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Application for Re-hearing and the motion for oral argument should be and the same is hereby denied.

/s/ Andrew Wilcoxen

Andrew Wilcoxen, Chief Judge

/s/ Forney Sandlin

Forney Sandlin, Judge

/s/ Bill Settle

Bill Settle, Judge

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Wednesday, October 13, 1982

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

55,153 Lee Roy West v. Jewel West a/k/a Jewell A. West.
Certiorari denied.

CHIEF JUSTICE

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-1158

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JEWELL WEST a/k/a JEWELL A. WEST,

Petitioner,

vs.

LEE ROY WEST,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Ill. 1949, 69 S.Ct. 1073, 337 U.S. 235,
93 L.Ed. 1333 3

STATUTES:

Section 176, Title 12 Okla. Stat. 3,4,5

Section 1031, Title 12 Okla. Stat. 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1158

JEWELL WEST a/k/a JEWELL A. WEST,

Petitioner,

vs.

LEE ROY WEST,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

I

THE PETITIONER FOR WRIT OF CERTIORARI AND BRIEF OF PETITIONER DOES NOT FAIRLY PRESENT THE QUESTION DETERMINED BY THE SUPREME COURT OF OKLAHOMA.

The question presented in petitioner's brief and the argument in support thereof, does not fairly present the total facts surrounding the decision of the Supreme Court of

Oklahoma, nor does it present the full authority and grounds upon which the final decision of the Court rested.

Petitioner has restricted her question presented to the validity of a state civil procedure statute whereby notice was perfected by publication against an out of state defendant whose "alleged" mailing address was determined prior to entry of default judgment. The question not presented by petitioner, but as shown by all facts before the Trial Court, Court of Appeals and Supreme Court of Oklahoma, is the undisputed fact that at the time service by publication was initiated and perfected, in complete accordance with applicable Oklahoma law, that the whereabouts of petitioner was totally unknown and it was not until after the notice had been published that petitioner "surfaced" as her address became known. (See District Court Findings of Fact - page 17a of Petitioner's Brief.)

The District Court made an extensive finding in its Decree of Divorce, reproduced in full at page 8a of petitioner's brief, that the Notice by Publication was proper and met all statutory requirements and minimum standards of state and federal due process of law and that the respondent had no knowledge of petitioner's location or whereabouts at the time publication service was perfected. The Oklahoma Court of Appeals confirmed this finding in its opinion found at page 23a of petitioner's brief and the Supreme Court of Oklahoma confirmed said finding in denying certiorari.

The District Court and the Oklahoma Court of Appeals discussed in their respective decisions, *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713 (Okla. 1968), which decision was predicated upon and adopted the standards of this Court's decision in *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) and *Schroeder v. City of New York*, 371 U.S. 208, 83

S.Ct. 279, 9 L.Ed.2d 255 (1962). Both the District and Appeals Court found that the prerequisites for proper service by publication had been met.

II

THE DECISION OF THE SUPREME COURT OF OKLAHOMA RESTED ON OTHER INDEPENDENT AND NON-FEDERAL GROUNDS.

This Court has consistently held that it will not review the judgments of state courts which rest on adequate non-federal grounds and that when a decision could have been based on either federal or state grounds and the state ground is sufficient to sustain said judgment, that the matter will not be subject for review by the United States Supreme Court. *Dixon v. Duffy,* Cal. 1951, 72 S.Ct. 10, 342 U.S. 33, 96 L.Ed. 46; *Young v. Ragen,* Ill. 1949, 69 S.Ct. 1073, 337 U.S. 235, 93 L.Ed. 1333; and *Lamb Enterprises, Inc. v. Kiroff,* D.C. Ohio 1975, 399 F.Supp. 409, reversed on other grounds 549 F.2d 1052, certiorari denied 97 S.Ct. 2927, 431 U.S. 968, 53 L.Ed.2d 1064.

Petitioner commenced her action on April 16, 1979 by filing with the District Court of Osage County, Oklahoma (Trial Court) a Motion to Vacate Judgment entered by said court on March 7, 1979.

Vacation of judgments is governed by legislatively enacted statutory proceedings in Oklahoma, namely, Section 1031 of Title 12, Okla. Stat., and Section 176 of Title 12, Okla. Stat. In accordance with, and not disputed by petitioner at any stage of the proceedings, or in her brief before this Court, petitioner was required to allege and prove the necessary facts

which would warrant the Trial Court vacating the judgment under 12 Okla. Stat. §176.

The controlling portion of 12 Okla. Stat §176 applicable to this case is:

> "A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened the applicant shall . . . make it appear to the satisfaction of the court, by affidavit, or other evidence *that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense*; . . ." (Emphasis added)

The District Court and Court of Appeals by their respective decisions reproduced in full at page 17a and 23a of petitioner's brief, and the Supreme Court of Oklahoma by denying certiorari, all found that petitioner in this case had "actual notice and knowledge of the pendency of the action in time to appear and make her defense" and by reason thereof, was not entitled to have the judgment vacated. In fact, the evidence showed that she not only had actual notice, but had talked with an attorney concerning the matter. (See Appeals Court Decision, page 25a)

The decision of the Supreme Court of Oklahoma, supported in part by its prior decision, *Gann v. Gann,* 469 P.2d 605 (Okla. 1969), held that since petitioner had actual notice before judgment in time to defend and chose to ignore it, she was prevented from seeking post vacation of the judgment under 12 Okla. Stat. §176.

As stated by the Oklahoma Court of Appeals in its decision:

> "The dispositive issue herein centers around the issue of whether or not the appellant (petitioner herein) had

actual notice of the proceedings in time to appear in court and make her defense."

"The facts of this matter as affirmatively shown in the letter of February 5, 1979, produced as plaintiff's (respondent herein) Exhibit No. 1 at the hearing on July 7, 1979, specifically recites the appellant (petitioner herein) has notice of the publication in the newspaper that the plaintiff (respondent herein) had filed an action for divorce."
(page 27a of petitioner's brief)

Therefore, the decision of the Oklahoma Court rests on the undisputed facts that the petitioner herein did have actual knowledge of the pendency of this action in time to defend, and therefore, in accordance with the provisions of 12 Okla. Stat §176, her Motion to Vacate Judgment was properly overruled by the District Court.

Nowhere in the proceedings at state court level did petitioner herein question the validity of 12 Okla. Stat. §176 or raise any constitutional question with regard to the same. Petitioner's sole case is based upon the validity of service through the publication notice, but as can be seen this was not the determinative issue to be decided under Oklahoma law in determining whether petitioner could be successful in attempting to vacate the judgment. The question was one of "actual notice" to entitle petitioner to the benefits of the Oklahoma Statute, and petitioner failed to prove and in fact the record affirmatively shows that she did have actual notice of all proceedings in time to properly defend.

By Oklahoma Statute, the controlling basis and grounds upon which the decision of the Oklahoma Supreme Court rested was its finding and adjudication that the petitioner herein was not entitled to vacation of the judgment by statute, which decision is purely a non-federal question. Therefore, such decision by the Supreme Court of Oklahoma should not

be subject to review by this Court under authority heretofore cited.

III

THE PROCEDURE FOR SERVICE BY PUBLICATION DID MEET ALL STATUTORY REQUIREMENTS AND MINIMUM STANDARDS OF STATE AND FEDERAL DUE PROCESS OF LAW.

Notwithstanding that the decision of the Supreme Court of the State of Oklahoma is primarily founded on its application of the facts to procedural statutes for vacating judgments, the court did consider, and the evidence clearly shows, that the method employed for service by publication was proper. The District Court, Court of Appeals and the Supreme Court of Oklahoma all found that the publication service was proper and met statutory requirements and minimum standards of state and federal due process of law.

In *Mullane v. Central Hanover Bank and Trust Company, supra,* this Court stated:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

This rule of law and the standards promulgated by the Court in the *Mullane* decision has been restated by the court many times and in particular in *Schroeder v. City of New York, supra.*

The Supreme Court of Oklahoma adopted said rule and

standards provided therein in their decision in *Bomford v. Socony Mobil Oil Co., supra.* Therein the Oklahoma Supreme Court held:

> "The general rule that emerges from *Mullane* and subsequent cases is simple: A state cannot invest itself with, and exercise through its court, judicial jurisdiction over a person in a proceeding which may directly and adversely affect his legally protected interest, unless a method of notification is employed which is reasonably calculated to give him knowledge at a meaningful time and in a meaningful manner of the attempted exercise of jurisdiction and an opportunity to be heard."

In the case at bar, the District Court as well as the Court of Appeals in their decisions made specific reference to the above cited cases and in particular to the decision of the Supreme Court of Oklahoma in *Bomford.* The Oklahoma Court of Appeals in applying the rule of law and standards set down in *Bomford* as adopted from *Mullane,* to the facts in this case, held:

> "The method of notice by publication in the West case (case at bar), was proper in all respects and so held by the Trial Court. Since the intent or purpose is to give the party being sued knowledge or notice in time to respond to said suit, said purpose was achieved in this case as the appellant (petitioner herein) in her letter dated February 5, 1979, to the appellee (respondent herein) acknowledged the fact that the newspaper carried a notice that he had filed against her for divorce, she even contacted legal counsel to ascertain her rights of the matter. Therefore, the prerequisites of *Bomford v. Socony Mobil Oil Co., supra,* were met."
> (page 27a of petitioner's brief)

The clear question before the court in Oklahoma at all stages and before this Court, was the fact that the publication notice was in all respects proper and it was not until after the

publication notice had become effective that the respondent herein had any knowledge as to the whereabouts of the petitioner; that petitioner had actual notice of the divorce proceedings in more than ample time to defend (a minimum of 26 days). (page 29a of petitioner's brief)

The decision of the Oklahoma Supreme Court is directly in line with the previous decisions of this Court as to granting due process of law in matters involving notice by publication and the rules and standards applied by the Oklahoma court are as previously established by this Court in *Mullane.*

IV

PETITIONER HAS NOT FAIRLY OR CORRECTLY STATED CERTAIN EVIDENTIARY FACTS.

On appeal to the Court of Appeals of Oklahoma, this respondent suggested in his answer brief that based on certain statements petitioner made in her brief that she had either misunderstood the evidence or had misread the transcripts of evidence. However, such misunderstanding or misreading does not normally happen a second time and, therefore, respondent herein is compelled in proper representation of his client to state to this court that petitioner has in her brief intentionally misstated undisputed factual evidence.

In particular, appearing at page 11 of petitioner's brief is a statement stating that in *Bomford, supra,* plaintiff therein had not exercised due diligence in locating the address of defendant prior to publication notice - Petitioner goes on to state that in the case at bar, the respondent "not only knew the whereabouts of the petitioner, he intentionally misled the

court when on the date for the default judgment he failed to state that he was aware of petitioner's whereabouts". Several lines further on, petitioner indicates that such action was fraudulent. These statements are absolutely and unequivocally false.

The District Court and the Court of Appeals affirmatively found from the evidence introduced that respondent had no knowledge whatsoever of the whereabouts of the petitioner at the time the petition and affidavit for notice by publication were filed and publication notice started. The Decree of Divorce entered by the Trial Court, reproduced in full at page 8a of petitioner's briefs, shows at the bottom of page 9a that the plaintiff himself (respondent herein) introduced into evidence the letter from the defendant (petitioner herein) dated February 5, 1979, which advised the plaintiff that she had seen or had knowledge of the notice of publication in the newspaper about the divorce and had contacted a law firm. That was the same letter that gave her address. The first letter which gave any indication of her address was received on January 27, 1979, but the affidavit for service by publication was filed on January 16, 1979 and the first publication commenced on January 19, 1979 (page 24a of petitioner's brief).

After discussing fully the evidentiary facts before the Trial Court, the Oklahoma Court of Appeals in its final decision stated in part:

> "The method of notice by publication in the West case was proper in all respects and so held by the Trial Court."
> (page 27a of petitioner's brief)

Petitioner in the argument portion of her brief implied and suggested to this court that her whereabouts was known or could have been easily ascertained by respondent prior to

filing the affidavit for notice by publication. The evidentiary facts before the Oklahoma courts clearly disproved this statement. The Decree of Divorce entered by the District Court as well as the opinion of the Oklahoma Court of Appeals, both recite sufficient facts to inform this Court that such statements by petitioner are not factual and that those facts did not exist. The evidence was absolutely to the contrary showing that the respondent, using every method available, tried for five months to locate the petitioner to no avail as she secretly kept here whereabouts hidden. (See Appeals Court decision at page 24a of petitioner's brief.)

V

CONCLUSION

Based on the principles above set forth, the decisions and rules of this Court, respondent respectively states to this Court that the decision of the Supreme Court of Oklahoma (1) rests on independent non-federal ground and (2) the decision as to any federal question is not in conflict with any prior decision of the Oklahoma court or this Court but is in direct line with previous decisions of the Oklahoma Supreme Court and this Court. Therefore, respondent respectfully prays that the petition for certiorari be denied.

Respectfully submitted,

/s/ W. Robert Wilson

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CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that a true and correct copy of the above and foregoing brief in opposition to the petition for certiorari was duly mailed to counsel of record, Jack Duane Heskett and Frederick Scott Esser, 502 Union Bank & Trust bldg., Bartlesville, OK 74003, with postage prepaid thereon.

/s/ W. Robert Wilson

W. Robert Wilson